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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, ~~1948.~~ 1949

No. ~~565~~ 23

NEROY CARTER,
Petitioner and Appellant Below,

v.

ATLANTA AND SAINT ANDREWS BAY RAILWAY COMPANY,
Respondent and Appellee Below.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

BRIEF

For Atlanta and Saint Andrews Bay Railway Company in Opposition.

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For Atlanta and Saint Andrews Bay Railway Company in Opposition.

The facts of this case are adequately stated in the opinion of the lower court reported in 170 Fed. 2d 719 and shown at page 214 of the record. For this reason we will not burden the court with a further statement of facts. We do wish, however, to (1) correct three statements appearing in the petition for certiorari, (2) to define the single issue in the case, and (3) to list the salient facts in relation to this issue which, as we contend, compelled the judgment below:

(1) CORRECTIONS.

At page 4 of the petition for certiorari appellant states that after the first coupling was attempted but failed Carter signed or signalled the engineer that the car "was

rolling." The record simply does not bear out this statement. On the contrary, the plaintiff's testimony very clearly shows that he never signalled the engineer that the coupling had missed and that the only signal he ever gave was "come ahead." (R., pp. 119, 121, 123, 186 and 187.) In fact his testimony shows he gave the "come ahead" signal twice, once prior to the first attempted coupling and once after it, though in the second case he says he was signalling for the footboard man to come with his lantern. (R., pp. 119, 120 and 121.) He also testified he never gave any other signal. (R., p. 121.)

At page 6 of the petition for certiorari the appellant makes for the first time a contention that the Safety Appliance Act was violated because of defective brakes on L. & N. Car No. 20042. No complaint was made in the petition that the brakes on this car were defective nor was any such contention advanced at the trial. Clearly this point has been raised too late.

At page 7 of the petition for certiorari appellant says that if the engineer had applied the brakes in emergency the train could have been stopped short of the second impact. In support of this statement appellant refers to pages 54, 55 and 145 of the record. We do not wish to quibble with counsel as to what the record shows or to belabor the court with inferences which might be drawn from testimony. We merely submit that the jury has decided this issue against appellant and we say that a fair reading of the cited pages more nearly supports their verdict than it does the statement contained in appellant's petition.

(2) THE ISSUE.

Only a single issue is presented which is of such magnitude, importance or public interest as to conceivably warrant this court in granting certiorari. That is the issue of

the Federal Safety Appliance Act on which the lower court directed a verdict. All other issues were submitted to a jury and were found against appellant. This court has traditionally, and, we think, wisely, declined to review such matters.

(3) THE FACTS WITH RESPECT TO THIS ISSUE.

The following are the salient facts on the issue of the Safety Appliance Act which, as we contend, compelled the judgment below:

(1) Following the failure of the appliance in question and before the injury appellant safely brought the runaway car to rest without hurt or harm to anyone. (R., p. 111—This is also admitted in the original petition. R., p. 3.)

(2) After the failure of the coupling appellant again signalled the engineer to "come ahead" and this signal was received and obeyed. It was the only signal appellant gave. (R., pp. 119, 120, 121, 131.)

(3) Thereafter when the cars came together a second time—and this was the time when appellant was actually injured—the coupling in question functioned perfectly. (R., pp. 64, 124.)

(4) The gist of appellant's petition, as originally filed, was that in coming ahead the second time the engineer came too fast and in violation of a company rule. (It was only by amendment and apparently as an afterthought that the Safety Appliance Act was brought into the case.) These issues were submitted to the jury and were found against appellant.

(5) Appellant himself was in charge of the train. (R., p. 117.)

ARGUMENT.

In his petition for certiorari appellant contends that the lower court's interpretation of the Safety Appliance Act, particularly as applied to the question of proximate cause, is in conflict with three decisions of this court and that for this reason certiorari should be granted. As this issue appears to present the only real question in the case we shall briefly review the factors which clearly make the present case distinguishable.

In the first case cited by appellant,[1] hereinafter called the **Coray** case, a defective appliance caused a moving train to stop suddenly in the path of an on-coming velocipede on which plaintiff was riding. A collision immediately followed. From these facts it is apparent at a glance that there was a direct and foreseeable causal connection between the failure of the appliance and the collision which immediately ensued. From the failure of the appliance the injury was the natural, immediate, and one is tempted to say, inevitable, result. Between the failure of the appliance and the injury there was neither the slightest pause nor the intervention of any other producing cause or stimulus.

In the second case cited by appellant,[2] herein called the **Myers** case, a brakeman was injured when a brake he was tightening "kicked back," throwing him from his car. This court merely held that the failure of the appliance to function properly was sufficient to support a finding that (1) it was defective and, (2), that this defect was the proximate cause of the injury. Here the question of proximate cause was only incidentally involved. In fact a more direct causal connection can hardly be imagined.

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1 Coray v. Southern Pacific Co., 93 L. ed. 243 (U. S. Supreme Court Law Edition Advance Opinions, Vol. 93—No. 5).

2 Myers v. Reading Co., 331 U. S. 477, 67 S. Ct. 1334, 91 L. ed. 1615.

The real question was whether there was sufficient evidence to show that the appliance was defective. When this was decided in the affirmative liability followed as a matter of course.

In the final case cited by appellant,[3] herein called the **Layton** case, the failure of a coupling set in motion a string of cars on which plaintiff was riding, so that, without pause or intervention, they collided with other cars, causing the injury complained of. Here again, we believe, a direct causal connection is clearly apparent.

From such situations the present case is clearly distinguishable.

In the outset let us freely concede that in the present case the Safety Appliance Act was violated—that a coupling failed to couple on impact; and that from such failure the car in question was set in motion. Let us concede further that up to this point the present case is identical with the **Layton** case and similar in principle to the other cases cited by appellant. And if from the events thus set in motion an injury had ensued we would concede that appellant's cases were controlling. But no such injury did ensue. Instead the moving car was thereafter brought safely to rest. At this point its capacity for doing harm was spent, and it was only the second movement of the train, brought on by appellant's own signal, which started a new chain of events resulting in his injury. Of course, had the coupling failed the second time appellant would have a different case. In the same way had the train been negligently moved the second time appellant might still have recovered on general negligence. But these are not the facts. Appellant himslf admits that in the second movement the coupling functioned perfectly; and on the question of general negligence a jury has found for appel-

3 L. & N. R. R. Co. v. Layton, 243 U. S. 617, 37 S. Ct. 455, 61 L. ed. 953.

lee. Thus on the facts actually presented, we submit that the judgment of the Circuit Court was correct, and in fact required, and that for this reason certiorari should be denied.

Respectfully submitted,

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